INDEX

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTE INVOLVED	3
STATEMENT	3
ARGUMENT	8
1. The ruling of the Court of Appeals with respect to respondent trainmen's standing on the passenger roster presents no question of general importance, is not in conflict with decisions in other circuits, and is correct	8
2. The decision below that petitioners are not entitled to damages for asserted failure to accord them the opportunity to transfer back to the freight roster with antedated freight seniority presents no matter of substance, does not conflict with decisions in other circuits, and is obviously correct	11
CONCLUSION	15

CITATIONS

Cases:

Boston & Maine R. Co. v. David, 167 F. 2d 722 (C. C. A. 1)	10
Fishgold v. Sullivan Corp., 328 U. S. 275	9
Hewitt v. System Federation No. 152, etc., 161 F. 2d 545 (C. C. A. 7)	10
Morris v. Chesapeake & Ohio Ry. Co., 171 F. 2d 579 (C. C. A. 7), cert. denied 336 U. S. 967	11
Oakley v. Louisvtlle & N. R. Co., 338 U. S. 278	9
Raulins v. Memphis Union Station Co., 168 F. 2d 446 (C. C. A. 6)	10

PAGE

Spearmon v. Thompson, 167 F. 2d 626 (C. C. A. 8), cert. denied 335 U. S. 822 and 335 U. S. 886 10
Special Service Co., Inc. v. Delaney, 172 F. 2d 16 (C. C. A. 5) 10
Trischler v. Universal Potteries, Inc., 78 F. Supp. 609 (S. D. Ohio), affirmed 171 F. 2d 707 (C. C. A. 6) 10

Statutes:

Selective Training and Service Act of 1940 (54 Stat. 885, as amended, 50 U. S. C. App. 301 et seq.) 2, 3, 5, 7, 8, 12, 14
Sec. 8(b) 3, 9
Sec. 8(c) 3, 9
United States Code, Title 28, Sec. 1254(1) 2

Supreme Court of the United States

October Term, 1949

No. 575

R. E. CONNER, KENNETH L. KNITTER, and VINCENT L. PETENBRINK, Suing on Behalf of Themselves and All Others Similarly Situated, *Petitioners,*

vs.

THE PENNSYLVANIA RAILROAD COMPANY, BROTHERHOOD OF RAILROAD TRAINMEN, H. F. SITES, A. F. WHITNEY, E. W. WILSON, CHARLES F. PUSEY, J. H. ALLERS, JOSEPH M. DECKER, C. A. LEATHERS, JR., E. R. BRISCOE, J. E. BERBIG, F. J. MEADOWCROFT, C. H. GITTINGS, W. F. HARRISON, NATHAN BERKMAN, J. M. PARKER, EARL R. DEANER, B. J. SHANKWEILER, I. E. WAGNER, H. F. HANNY, W. A. SCOTT, H. W. HIGHFIELD, R. E. SATTERFIELD, SANFORD R. HALLIDAY, L. C. LECOMPTE, E. D. SAXTON, and CLIFTON K. AREHART.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR RESPONDENTS OTHER THAN THE PENNSYLVANIA RAILROAD COMPANY IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (R. 65-72) is reported in 177 F. 2d 854. The opinion of the district court (R. 60-62) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on August 1, 1949 (R. 73). Petitioners' application for rehearing was denied on October 5, 1949 (R. 85). On December 29, 1949, Chief Justice Vinson extended petitioners' time for applying for certiorari to February 2, 1950 (R. 90). The petition for writ of certiorari was filed on that date. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

(1) Whether the Court of Appeals correctly held that under the collective bargaining agreement and established custom and practice the respondent trainmen had a right to transfer from freight to passenger service on the basis of seniority, and therefore they were entitled under the Selective Training and Service Act of 1940 upon their return from military service to transfer to the passenger roster with seniority on that roster from the dates on which they would have been transferred but for their absence on military duty.

(2) Whether the Court of Appeals correctly held that petitioners are not entitled to damages for asserted failure to permit them to transfer back from passenger to freight service with seniority on the freight roster ahead of those who entered freight service after petitioners joined the armed forces, where petitioners have at no time to date requested such transfer and even now in their amended complaint ask only that they be "tendered" the "opportunity" so to elect in the event they lose in their attack on respondent trainmen's standing on the passenger roster.

STATUTE INVOLVED

The pertinent provisions of the Selective Training and Service Act of 1940 (50 U. S. C. App. 308; 54 Stat. 885, § 8, as amended) are set out in the petition for certiorari, and will not be repeated here.

STATEMENT

This is a class action by petitioners for declaratory judgment, injunction, accounting and money damages for alleged nonconformance with the reemployment provisions of §§ 8(b) and 8(c) of the Selective Training and Service Act of 1940. The named petitioners are three trainmen employed on the Maryland Division of The Pennsylvania Railroad Company (R. 11-12). Respondents are The Pennsylvania Railroad Company (R. 12-13); Brotherhood of Railroad Trainmen—the collective bargaining agent of the trainmen employed by the Railroad—its President and its General Chairman (R. 13); and twenty-three trainmen employed by the Railroad on its Maryland Division (R. 14).

The district court granted motions for summary judgment filed by the Railroad and by the respondents other than the Railroad (R. 62-63). The Court of Appeals affirmed in part and reversed in part (R. 73). The undisputed facts as shown by the complaint and the affidavits on the motions for summary judgment may be summarized as follows:

The Railroad maintains separate seniority rosters for freight and passenger service on its Maryland Division (R. 17). Rule 1-D-3 of the collective bargaining agreement between the Brotherhood and the Railroad provides for transfer from one roster to another as follows (R. 15):

1-D-3 (a) On a seniority district where, on the effective date of this Agreement, it is the practice to employ trainmen for passenger, or freight or yard service exclusively, when additional passenger trainmen are needed the applications of freight and yard trainmen on the said seniority district shall be given consideration, after which the applications of switchtenders on that seniority district shall be considered.

(b) When additional freight and yard trainmen are required on a seniority district where the practice referred to in paragraph (a) is in effect, the applications of passenger trainmen shall be given consideration, after which the applications of switchtenders on that seniority district shall be considered.

(c) Notice shall be published on bulletin boards giving the said trainmen and switchtenders reasonable time within which to file their applications.

Rule 3-F-1 provides that one who accepts "permanent transfer" from one roster to another "shall retain the seniority he earned in the group from which transferred and shall acquire seniority in the group to which transferred from the date of transfer" (R. 16).

The affidavits filed in support of the motions for summary judgment show unequivocally that it has always been the custom and practice of the Railroad, when additional passenger trainmen are needed on the Maryland division, to transfer to passenger service the trainmen in freight service who possess the greatest seniority and who make application for the transfer (R. 42, 45, 46). Petitioners' affidavits say nothing in contradiction, and this fact may therefore be accepted as undisputed.

Both the respondent trainmen and the petitioners are trainmen employed on the Maryland Division of the Railroad, are veterans of the recent war, and were originally employed by the Railroad as freight trainmen (R. 11-12, 14, 18-19). Petitioners transferred from freight to passenger service before their entry upon military duty (R. 11-12). The respondent trainmen, however, who entered

the armed forces before petitioners, were still on the freight roster when they left for military duty.

One of respondents, I. E. Wagner, entered military service on February 12, 1941 and was released the same year (R. 25). During his absence a number of freight trainmen junior to him were transferred to the passenger roster under Rule 1-D-3 (id). Immediately upon his return Wagner applied for similar transfer (id). The question of his seniority on the passenger roster arose. There resulted an exchange of correspondence between the Brotherhood and the Railroad culminating on February 5, 1942 in an agreement on the question (R. 25-30). The agreement provided that, in view of Regulation 1-D-1 (now Rule 1-D-3) and the established custom and practice of transferring trainmen from freight to passenger service on the basis of freight seniority, a freight trainman who would have had the opportunity to apply for transfer to passenger service but for his absence on military duty and who applied for such transfer within ten days after his return, should under the Selective Training and Service Act of 1940 "be given standing on the passenger brakemen's roster ahead of the immediate junior freight or yard man accepted for passenger service during his occupation in military or naval service" (R. 30). That policy was consistently followed thereafter.

All of the other respondent trainmen applied for transfer to the passenger roster within ten days after their return from military service. It is undisputed that each of them, had he been present and applied, would have been transferred to passenger service ahead of his immediate junior on the freight roster who transferred during his absence (R. 44). Accordingly, each was given standing on the passenger roster immediately ahead of that junior (R. 19). Petitioners, who had transferred from freight to passenger service before leaving for military duty, upon their return were restored to passenger

service with the seniority on that roster which had accumulated during their absence (R. 11-12).

The net effect of this practice was to give respondent trainmen and petitioners the same relative seniority positions on the passenger roster they had formerly enjoyed on the freight roster, except of course where men had failed to exercise the opportunity to apply even though present and able to so do. A respondent trainman who was senior to a petitioner on the freight roster, but who entered military service earlier and therefore was unable to elect to transfer before the petitioner did, was permitted upon his return from military service to transfer to the passenger roster with seniority ahead of that petitioner (R. 55-58).

In their amended complaint petitioners alleged alternative causes of action with corresponding prayers for alternative relief. First, they alleged that respondent trainmen were given wrongful seniority on the passenger roster. Thus they asserted that respondent trainmen should not have been permitted to transfer at all or should have been given seniority only from the dates on which they actually transferred after their return, and not from the dates on which they would have been transferred but for their absence (R. 18-20).

As an alternative cause of action, urged only in the event they fail on their first cause, petitioners asserted that under Rule 1-D-3(b) of the collective bargaining agreement each of them should now be "tendered" the "opportunity" of transferring back from passenger to freight service with seniority immediately ahead of the first employee who joined freight service after that petitioner left for military duty, together with a tender of damages for failure to accord them the opportunity so to transfer upon their return from the armed forces (R. 22-24). Petitioners have never at any time since their return requested such retransfer to freight service, and did not even make such a suggestion in their original complaint (R. 9-10).

The first reference to this matter came in their amended complaint filed December 17, 1947, well over a year after the last of them had returned to private employment and been reinstated on the passenger roster with service-accumulated seniority. Even there they do not request retransfer, but ask only the "opportunity" to elect to do so if they lose in their attack on respondent trainmen's positions on the passenger roster (R. 22-24). Moreover, as both the district court and the Court of Appeals pointed out (R. 62, 71), there was never any custom or practice of transferring from passenger to freight service on the basis of passenger seniority.

The district court granted respondents' motions for summary judgment as to both causes of action. It held that, since it was the established custom under the contract to permit transfer from freight to passenger service on the basis of freight seniority, respondent trainmen were entitled to transfer with accumulated passenger seniority under the Selective Training and Service Act of 1940. It ruled that petitioners had no right to transfer back from passenger to freight service with accumulated freight seniority, since there had never been any custom of such transfer from passenger to freight service and it is clear that petitioners would not have elected so to transfer had they been present when the freight vacancies arose (R. 62).

The Court of Appeals likewise held that respondent trainmen are entitled to their standing on the passenger roster, because under the contract "the established practice was to transfer to passenger service qualified trainmen in freight service who made application for such transfer and who possessed the highest seniority in freight service" (R. 69) and because "to allow these men to transfer but to place them at the bottom of the list would be to penalize them by reason of their being in the service" (R. 70). With respect to the alternative cause of action, the Court of Appeals held that petitioners are not entitled to

damages for the alleged failure to accord them the opportunity to retransfer to freight service, because they had never requested such retransfer. It concluded, however, that petitioners should now be tendered that opportunity, even though no request for such retransfer had ever been made and even though there was never any custom or practice of transferring from passenger to freight service on the basis of seniority, as there is in the case of transfer from freight to passenger service (R. 71-72).

Petitioners seek review of all rulings of the Court of Appeals adverse to them. This brief in opposition is filed on behalf of the respondents other than the Railroad. Both these respondents and the respondent Railroad have filed conditional cross-petitions (Nos. 645 and 646, this Term) asking review of that part of the Court of Appeals decision adverse to them in the event, but only in the event, that this Court should grant petitioners' application here.

ARGUMENT

1. The ruling of the Court of Appeals with respect to respondent trainmen's standing on the passenger roster presents no question of general importance, is not in conflict with decisions in other circuits, and is correct. This ruling does not involve any question of construction of the Selective Training and Service Act of 1940, but rests entirely upon the contract provisions and the established custom and practice concerning transfer from one roster to another.[1]

---

[1] It is to be noted that, while petitioners seek to base their first cause of action on the provisions of the Selective Training and Service Act of 1940, they do not complain of noncompliance with the Act by reason of failure to accord them service-accumulated seniority. They were restored to the passenger roster with full seniority accruing during their absence. Petitioners' complaint is that respondent trainmen, who are also veterans and who entered military service before petitioners, received greater seniority than

Sections 8(b) and 8(c) of the Act provide that a person leaving a private position for military service shall upon his return be restored to the same or a like position without loss of seniority, and with all benefits granted under established rules and practices relating to furlough or leave of absence. This Court has established that under the statute a veteran is "not to be penalized" or "lose ground" by reason of his absence, and that the purpose of the Act is "to preserve the veteran's rights under" seniority systems. *Fishgold* v. *Sullivan Corp.*, 328 U. S. 275, 284-288; *Oakley* v. *Louisville & N. R. Co.*, 338 U. S. 278, 283. The decision below correctly follows those principles as they apply to the particular facts of this case.

The collective bargaining agreement between the Brotherhood and the Railroad expressly provides for transfer from freight to passenger service (R. 15).[2] It is undisputed in the record (R. 42, 45, 46), and both the district court and the Court of Appeals expressly concluded (R. 60-62, 69), that it was the established custom and practice to transfer from freight to passenger service on the basis of freight seniority. Both courts below decided that, in view of the contract and the established custom and practice, the right to transfer from freight to passenger service is a valuable seniority right which must be made effective as of the date the right arose, if respondents are not to be penalized or lose ground by virtue of their absence on

---

they are entitled to, and that petitioners' positions on the passenger roster were thereby affected. In this regard petitioners' status as veterans is irrelevant, since they are affected no more than non-servicemen who transferred to the passenger roster during the absence of respondent trainmen.

[2] Moreover, contrary to petitioners' assertion (Pet. 9), Rule 2-A-3(b) of the collective bargaining agreement expressly states that a trainman on furlough or leave of absence for 30 days or more "upon his return to duty may exercise his seniority on any assignment or pool" whether or not filled during his absence. This rule appears in Exhibit A to the amended complaint, which is on file with the Clerk although not included in the printed record.

military duty. Of course if the right of transfer is a seniority right it is protected by the statute. The only question there could be, therefore, is whether the Court of Appeals correctly held this to be a seniority right. That question turns solely on the contract and the established custom and practice and thus is not of such general importance as to warrant certiorari.

The ruling of the Court of Appeals in no way conflicts with decisions in other circuits. Petitioners suggest inconsistency with a number of cases. *Hewitt* v. *System Federation No. 152,* etc., 161 F. 2d 545 (C. C. A. 7, 1947); *Raulins* v. *Memphis Union Station Co.,* 168 F. 2d 466 (C. C. A. 6, 1948); *Spearmon* v. *Thompson,* 167 F. 2d 626 (C. C. A. 8, 1948), certiorari denied, 335 U. S. 822 (sub. nom. *Thompson, Trustee* v. *Spearmon*), and 335 U. S. 886 (sub nom. *Delozier* v. *Thompson, Trustee*), opinion on rehearing, 173 F. 2d 452; *Special Service Co., Inc.* v. *Delaney,* 172 F. 2d 16 (C. C. A. 5, 1949); *Boston & Maine R. Co.* v. *David,* 167 F. 2d 722 (C. C. A. 1, 1948); *Trischler* v. *Universal Potteries Inc.,* 78 F. Supp. 609 (S. D. Ohio, 1947), affirmed 171 F. 2d 707 (C. C. A. 6, 1948). All of those cases are plainly distinguishable. In the *Hewitt, Raulins, Spearmon,* and *Delaney* cases, there was no contract or established custom providing for transfer from one roster to another on the basis of seniority. In the *Trischler* case, not only was there no such contract or custom but actual experience on the job was an important requirement for transfer. The *David* case did not involve the issue of right to transfer with accumulated seniority or any other question pertinent here, but dealt only with whether the employer was required to give a veteran employment when no work was available.

Moreover, the decision below is clearly correct. It is undisputed that during and except for the absence of respondent trainmen on military duty they would have been offered the opportunity to transfer to passenger serv-

ice on the basis of their freight seniority, and they would have been so transferred had they been present and applied (R. 44). They would then of course have accumulated seniority on the passenger roster from that date forward. To put them at the bottom of the passenger roster upon their return from military service, as petitioners suggest, would mean that all those trainmen who transferred to passenger service on the basis of freight seniority during the respondent trainmen's absence would now be above those respondents on the passenger roster. This includes petitioners since they made the election to transfer before they went into military service but after respondent trainmen had entered upon military duty. Obviously if respondent trainmen's right to transfer on the basis of freight seniority is to be protected, it must be made effective as of the date the right arose.

The decision below is squarely in line with that in *Morris* v. *Chesapeake & Ohio Ry. Co.*, 171 F. 2d 579 (C. C. A. 7, 1948). There as here the court held that, since under the collective bargaining agreement and established custom an employee was entitled to elect to transfer from one roster to another on the basis of seniority, a returning veteran who made that election should be given seniority on his new roster from the date he would have been transferred but for his absence. This Court denied certiorari in that case on May 2, 1949 (336 U. S. 967), although all of the decisions which petitioners rely upon here to show conflict were then in existence and the petitioners there similarly asserted a conflict among circuits. *A fortiori,* the petition should be denied here.

2. **The decision below that petitioners are not entitled to damages for asserted failure to accord them the opportunity to transfer back to the freight roster with antedated freight seniority presents no matter of substance, does not conflict with decisions in other circuits, and is obviously correct.** It is clear that this ruling does not involve any

question of interpretation of the Selective Training and Service Act of 1940, or any other issue of general importance. The decision on this question rests solely on the particular facts of this case.

Moreover, the ruling is manifestly correct. The Court of Appeals held that petitioners are not entitled to damages because "there is no indication that any of [them] requested a transfer under any circumstances" (R. 72). The Court concluded that: "It would be a harsh rule that would permit a serviceman to return to his job, keep silent for an extended period of time, even though he was fully aware of all the circumstances, and then claim damages from his employer for failure to offer him a right to a different job for which he never applied" (id.). This conclusion is so obviously correct that it requires no elaboration from us.

Petitioners seek to avoid this dilemma by making several wholly unfounded assertions. Thus they say that at least their amended complaint constituted a demand for transfer and they are entitled to damages from the date it was filed (Pet. 19, fn. 3). But even in the amended complaint—which was filed well over a year after the last of petitioners had returned from military service and been reinstated on the passenger roster with accumulated seniority—they do not demand retransfer. On the contrary, they ask only that they be "tendered" that "opportunity", and then only if they are unsuccessful in their attack on respondent trainmen's standing on the passenger roster (R. 22-24). Obviously petitioners cannot seek to improve their positions on the passenger roster by defeating respondent trainmen's standing thereon, and at the same time assert that they are entitled to damages for not being on the other roster during the period they are pursuing that effort if it should turn out to be unsuccessful.

Petitioners suggest that they had no notice of any rights they may have to retransfer to the freight roster (Pet. 21). But of course the collective bargaining agreement fully states whatever rights they may have to make such an election, if indeed there be any, and petitioners are charged with knowledge of those contract provisions. Petitioners say it would have been futile to demand transfer because both the Brotherhood and the Railroad now oppose it (Pet. 21-22). That is no answer to the fact that petitioners never suggested such transfer prior to their amended complaint, and even there make only a conditional request for the opportunity to elect so to transfer.

Petitioners assert that the issue of damages, in the event they are entitled to transfer, was not raised by the motions for summary judgment and was not briefed or argued in the Court of Appeals (Pet. 20). The motions for summary judgment attacked petitioners' right to transfer as well as their right to damages, and the district court granted the motions in full. Respondents similarly contested both points in the Court of Appeals, and that Court affirmed in part and reversed in part. The Court of course considered both points, as it pointed out in its *per curiam* opinion denying petitioners' application for rehearing (R. 84). And the fact that the Court held that petitioners should be given the opportunity to elect to transfer now does not mean that it was not entitled to hold that petitioners are nevertheless not entitled to damages. Apparently in an effort to make the same argument in another way, petitioners assert that the Court of Appeals should not have denied damages without a hearing (Pet. 24-25). But the Court clearly was entitled to rule that as a matter of law petitioners can recover no damages whatsoever because they have never at any time requested the opportunity to transfer back to freight service.

Petitioners say that under the Selective Training and Service Act of 1940 only the district court has authority to assess damages in the first instance. It does not follow, however, that the Court of Appeals has no power to rule that petitioners are entitled to *no* damages. Particularly is this true where, as here, the district court had already reached the same conclusion. Petitioners cite several cases which they say are in conflict with the Court of Appeals ruling on damages (Pet. 22-24). At most those cases merely indicate that where the veteran is entitled to *some* damages the amount should be determined initially by the district court. They have no bearing on the power of the Court of Appeals to hold as a matter of law that the veteran is entitled to no damages because he has never applied for transfer.

Petitioners in several places characterize the decision of the Court of Appeals as holding that they have been "wrongfully denied" an opportunity to transfer to the freight roster (Pet. 3, 12, 19). To the contrary, the Court below held only that under the collective bargaining agreement petitioners should now be given the opportunity to elect to transfer to freight service, and expressly concluded that petitioners have never demanded and therefore have never been denied such transfer. In our pending conditional cross-petition for certiorari in No. 646, this Term, we set out a number of reasons why petitioners are not even entitled to the right to transfer back to freight service with antedated seniority, a question which stands on a very different footing from that of the right of respondent trainmen to transfer to passenger service with antedated passenger seniority. Of course if petitioners have no right to transfer at all they obviously are entitled to no damages. However, we reiterate our position stated in the conditional cross-petition that in our view there is no question in the case which warrants certiorari.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari should be denied.

March 1950.

CARL MCFARLAND,
KENNETH L. KIMBLE,
Counsel for Respondents other than The Pennsylvania Railroad Company.